(6)

No. 91-610

In the Supreme Court of the United States

OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, ET AL., PETITIONERS

v.

NICHOLAS DEMISAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

KENNETH W. STARR
Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

RONALD J. MANN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

MARSHALL J. BREGER
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

MARK S. FLYNN
Attorney
Department of Labor
Washington, D.C. 20210

CAROL CONNOR FLOWE
General Counsel

JEFFREY G. COHEN
Deputy General Counsel

NANCY S. HEERMANS
Assistant General Counsel

MARC A. TENENBAUM
Attorney
Pension Benefit Guaranty Corporation
Washington, D.C. 20006

- 24

QUESTION PRESENTED

Whether Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. 186(c)(5), requires the trustees of multiemployer benefit plans to transfer part of the plans' reserves to new multiemployer funds set up by employers who leave the plans.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.[1]

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[1] The Department of Labor and the Pension Benefit Guaranty Corporation (PBGC) each have an interest in this case because it involves the duties of the trustees of a multiemployer pension plan subject to the Labor-Management Relations Act of 1947 and the Employee Retirement Income Security Act of 1974 (ERISA). The Secretary of Labor has significant enforcement responsibilities under ERISA. The PBGC, a wholly-owned government corporation with independent litigating authority, 29 U.S.C. 1302(b)(1) (and which therefore appears in this Court through its own counsel), is responsible for administering and enforcing Title IV of ERISA, including the Multiemployer Pension Plan

STATEMENT

Concern about the "corruption of collective bargaining representatives through bribery of employee representatives by employers" led Congress to enact Section 302 of the Labor-Management Relations Act (LMRA), 29 U.S.C. 186. That provision broadly prohibits the transfer of money from employers to union officials. See *Arroyo* v. *United States*, 359 U.S. 419, 424-426 (1959). However, Section 302 contains several exceptions to this broad prohibition. One exception, which is pertinent to this case, allows employers to establish employee benefit plans by paying money "to a trust fund established by [the employees'] representative." 29 U.S.C. 186(c)(5). This provision, set forth in Section 302(c)(5), protects employees by imposing a number of requirements on the operation of such trust funds; this case involves interpretation of the requirement that the funds be used "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents)."[2]

Petitioners are multiemployer pension and welfare benefit funds (the Greater Funds) and their trustees.

Amendments Act of 1980. This brief reflects the views of the PBGC as well as the Department of Labor.

[2] Section 302(c)(5) also requires that a fund be established pursuant to a written agreement and that employers and employees be represented equally in administration of the fund. See 29 U.S.C. 186(c)(5)(A)-(C). Transfers of money in violation of Section 302 are criminal, 29 U.S.C. 186(d), and federal courts have jurisdiction to restrain violations of Section 302, 29 U.S.C. 186(e).

The Greater Funds were established pursuant to a collective bargaining agreement between a multiemployer bargaining association, the Greater New York Health Care Facilities Association, Inc. (the Greater Association), and Local 144 of the Hotel, Hospital, Nursing Home and Allied Services Employees Union. Pet. App. 2a-3a, 14a. Respondents include a group of employers (the Southern Employers), management companies, and employees (the Southern Employees) that broke away from the Greater Association and established new multiemployer pension and welfare funds (the Southern Funds) through collective bargaining with Local 144. Pet. App. 2a-3a, 13a-14a.

The collective bargaining agreements between the Southern Employers and Local 144 provide that "[n]o employee shall lose benefits as a result of transfer of his/her coverage" from the Greater Funds. Pet. App. 15a. The agreements also require the Southern Employers to provide the same level of benefits that the Greater Funds provided. *Id.* at 3a. With respect to employees whose rights under the Greater Funds' pension plan had not vested at the time of the withdrawal, the Southern Funds give credit for time served. Accordingly, an employee with, say, nine years of service under the Greater Funds would satisfy the ten-year vesting requirement of the Southern Funds after one year of additional service. At that point, the employee would be entitled to receive his full pension from the Southern Fund. With respect to employees whose benefits with the Greater Funds already had vested at the time of the withdrawal, the Southern Funds agreed to supplement the amount due from the Greater Funds so that the total amount received would equal the total amount the employee

would have received if his employer had not left the Greater Funds. Thus, the Greater Funds remained fully liable for all vested liabilities incurred as of the date of withdrawal. *Id.* at 3a-4a, 16a.

To help finance the Southern Funds, respondents sought to have petitioners transfer a portion of the assets of the Greater Funds to the Southern Funds. When petitioners refused, respondents commenced this action in the United States District Court for the Southern District of New York, arguing, among other things, that the Greater Funds violated the "sole and exclusive benefit" provision of Section 302(c)(5) and their fiduciary duties under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, by refusing to transfer a portion of the Greater Funds' assets to the Southern Funds.

The district court ruled in favor of petitioners on both grounds. Pet. App. 13a-29a. The court concluded that Section 302(c)(5) imposes a duty to transfer assets only when necessary to facilitate the right of employees to change their collective bargaining representative. Because Local 144 was the representative of the Southern Employees both before and after the withdrawal, the trustees were not required to transfer the funds under that construction of the LMRA. Pet. App. 19a-21a. The court also rejected respondents' claim that the trustees of the Greater Funds had violated ERISA by breaching their fiduciary duty to participants. *Id.* at 28a.

The court of appeals reversed. Pet. App. 1a-12a. The court concluded that Section 302(c)(5) requires a tight link between the use of funds in a multiemployer benefit plan and the specific employee on whose behalf the funds were contributed. The court stated that "[i]t is only just, said Congress, that the employe [*sic*] whose hour's work required the em-

ployer to make a payment of five cents to the trust fund be assured of reaping the benefit of that payment." *Id.* at 9a. The court further concluded that a failure to require the Greater Funds to pay reserves to the Southern Funds "would operate as a windfall to the Greater Funds." *Ibid.* The court rejected petitioners' reliance on the language of Section 302 (c)(5), which permits the funds' assets to be used not only for the benefit of the employees on whose behalf the funds were contributed, but for the benefit of "employees of other employers" who contributed to the same fund. *Id.* at 10a-11a. In the court's view, Section 302(c)(5) requires a transfer, notwithstanding the statutory language, whenever "there is no chance, actuarial or otherwise, that any of the 'employees of [the departing] employer' [other than employees whose benefits already had vested] will ever receive benefits based on their contributions." *Id.* at 11a. Because the court ruled that the transfer was required by Section 302(c)(5) of the LMRA, it did not address respondents' claim that the fiduciary duties imposed by ERISA also obligated petitioners to transfer a portion of the assets of the Greater Funds. *Id.* at 12a.[3]

DISCUSSION

The court of appeals erred in interpreting the Labor-Management Relations Act to require the trustees of multiemployer benefit plans to transfer

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[3] Nor did the court of appeals determine how much money the Greater Funds were required to transfer to the Southern Funds. It said that "[a]s a general principle, the district court should require that the Greater Funds reallocate to the Southern Funds that portion of the reserves which represent contributions on behalf of Southern Employees for liabilities undertaken by the Southern Funds." Pet. App. 11a.

part of their plan's reserves to new multiemployer funds whenever departing employers set up new funds. As the Court has recognized, withdrawal from multiemployer pension plans was one of the core problems that led Congress to enact the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). See *Pension Benefit Guaranty Corporation* v. *R.A. Gray & Co.*, 467 U.S. 717, 723 (1984). By holding that the Labor-Management Relations Act includes a per se rule requiring trustees to transfer funds, without considering the more finely tuned and comprehensive regulation of the subject matter by ERISA and the MPPAA, the court has ignored the complex framework that Congress created to deal with these problems. Moreover, not only did the Second Circuit err in its interpretation, the decision squarely conflicts with the decision of the Seventh Circuit in *Stinson* v. *Ironworkers District Council Benefit Trust*, 869 F.2d 1014, 1021 (1989). Accordingly, review by this Court is warranted.

1. The court of appeals erred by concluding that the LMRA, specifically Section 302(c)(5), establishes a per se rule that trustees of a multiemployer plan must transfer assets any time an employer withdraws from the plan. The fundamental premise on which that conclusion rests is this: Trustees who fail to hand over funds to a new multiemployer plan set up by withdrawing employers violate the LMRA by refusing to use the funds entrusted to them for the "sole and exclusive benefit" of the employees on whose behalf the funds were contributed. See Pet. App. 10a-11a.

The court of appeals' premise cannot be reconciled with the language of Section 302(c)(5) itself. That provision permits the use of such funds not only for

the "sole and exclusive benefit of the employees of [the] employer" who contributed them, but also for the benefit of "the employees of other employers making similar payments." Thus, Section 302(c)(5) does not require trustees of multiemployer funds to segregate payments made by each employer and to use such payments solely for the benefit of employees of the contributing employer; to the contrary, the statute permits trustees administering multiemployer plans to pool employer contributions for the purpose of paying benefits to *all* participants in the plan. The only requirement established by the provision at issue is that the trustees must use the funds for "the benefit of employees and their families and dependents, to the exclusion of all others." *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 570 (1982) (rejecting a claim that Section 302(c)(5) requires eligibility rules to be reasonable); see *Robinson*, 455 U.S. at 572 ("None of the conditions [specified in 302(c)(5)] places any restriction on the allocation of the funds among the persons protected by § 302(c)(5).").

The court of appeals' view that the LMRA grants employees a right to trace and claim the contributions of their particular employers is at odds not only with the language of the statute, but with the basic structure of multiemployer plans. Once contributions enter such plans, the funds are tied neither to the individual employees on whose behalf the contributions were made, nor to the workforce of the employer who made the contributions. For example, contributions made "on behalf of" an employee who leaves the plan before serving long enough for his pension to vest will never benefit that employee in any way. Those contributions, pooled with all other contributions made on behalf of all other employees, instead will

be used to defray the costs of benefits paid to other participants in the trust, including the employees of other employers. See *British Motor Car Distributors, Ltd.* v. *San Francisco Automotive Industries Welfare Fund*, 882 F.2d 371, 378 (9th Cir. 1989); *Stinson*, 869 F.2d at 1022; *Local Union No. 5* v. *Mahoning and Trumbull County Building Trades Welfare Fund*, 541 F.2d 636, 639 (6th Cir. 1976) ("That the [fund's] rule results in certain employers' contributions being used for other than their employees does not violate the 'sole and exclusive benefit' requirement. Such imprecision is part and parcel of a pooled fund specifically authorized through 29 U.S.C. § 186(c)(5)." (citations omitted)); cf. 26 U.S.C. 413(b)(3) (in determining whether a multiemployer benefit plan meets the "exclusive benefit" requirement of Section 401 of the Internal Revenue Code, all plan participants shall be considered to be the employees of a contributing employer); 26 C.F.R. 1.413-1(d) (regulation implementing Section 413(b)(3)). Similarly, an employee's right to receive vested benefits continues even if the employer withdraws from the plan or otherwise ceases making payments. See *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 567 n.7, 579 n.20 (1985); H.R. Rep. No. 869, 96th Cong., 2d Sess. Pt. I, at 53 (1980) (multiemployer pension plans are preferable because they "enabl[e] a plan participant to retain benefit credits earned * * * even though the employer subsequently ceases contributing to the plan[, so that other employers] have the burden of funding the unfunded benefit obligations for employees of a withdrawn employer").

In addition, the court of appeals' interpretation of Section 302(c)(5) stretches the language of the statute to further a purpose far afield from that at which

the provision is directed. As this Court has explained time after time, Section 302's general prohibition on employer payments to employee representatives reflects Congress's concern with "corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959) (footnotes omitted); see *Robinson*, 455 U.S. at 572 (noting Congress's concern "that pension funds administered entirely by union leadership might serve as 'war chests' to support union programs or political factions, or might become vehicles through which 'racketeers' accepted bribes or extorted money from employers"); *Walsh* v. *Schlecht*, 429 U.S. 401, 410-411 (1977); *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 474 (1960) (Frankfurter, J., dissenting). Congress responded to that concern in Section 302 by enumerating specific standards "to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established." *Arroyo*, 359 U.S. at 426; see *Robinson*, 455 U.S. at 572 (noting that "[e]ach of the specific conditions [in Section 302(c)(5)] is consistent with the non-diversion purpose"). Because the conduct at issue in this case poses no risk that assets will be diverted from participants to the benefit of union officials, the purpose of the statute does not support the Second Circuit's broad interpretation of the language of Section 302(c)(5).

The court of appeals' error is made particularly clear by the court's unwillingness to pursue its ration-

ale to its logical conclusion. The court recognized the well-established rule that trustees are not required to transfer funds to a new plan whenever employees leave a plan. See *O'Hare* v. *General Marine Transport Corp.*, 740 F.2d 160, 173 (2d Cir. 1984) ("To claim that monies retained by the Funds contributed by an employer on behalf of all of its employees is not contributed 'for the sole and exclusive benefit of the employees of such employer' whenever some of the employees choose to leave the union and [the] fund would be an unfair and unrealistic construction of section 302(c)(5)."), cert. denied, 469 U.S. 1212 (1985). The court of appeals distinguished *O'Hare* on the ground that its rule was limited to situations in which "*some*, but not all, of an employer's employees" changed plans, Pet. App. 10a. By contrast, the court contended, judicial intervention is required when the employer leaves with all of its employees, because "there is no chance, actuarial or otherwise, that any of the 'employees of such employer' will ever receive benefits based on their contributions." *Id.* at 11a. But if the reason for judicial intervention is, as the court of appeals held, that Section 302(c)(5) is violated when "employees [do not] enjoy the 'sole and exclusive benefit' of their efforts," Pet. App. 9a, then there is no justification for the distinction articulated by the court of appeals. At bottom, if the statute requires contributions to be expended for the "sole and exclusive benefit" of the employees on whose behalf the contributions were made, trustees would be required to transfer funds whenever employees leave a plan, whether or not their employer leaves the plan as well. The obvious inconsistency of that result with the nature of multiemployer plans demonstrates that

the court of appeals' underlying premise is incorrect as well.[4]

2. In holding that Section 302(c)(5) of the Labor-Management Relations Act implicitly includes rules governing the transfer of assets among multiemployer pension plans, the court of appeals failed to recognize that Congress comprehensively regulated the topic in ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208. In particular, Subtitle E of Title IV of ERISA ("Special Provisions for Multiemployer Plans") contains specific provisions governing transfers of the assets of multiemployer pension plans, 29 U.S.C. 1411-1415, and Title I of ERISA imposes a general fiduciary duty on plan trustees that obligates them to consider asset transfer requests in good faith, 29 U.S.C. 1104.

a. Part 2 of Subtitle E ("Merger or Transfer of Plan Assets or Liabilities") expressly addresses the obligation of trustees to transfer assets in connection with the withdrawal of an employer from a multiemployer pension plan. First, Section 1411(a) prohibits any transfer of assets between multiemployer pension plans, except in accordance with the proce-

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[4] In any event, it is clear on the facts of this case that many of the Southern Employees will continue to receive benefits from the Greater Funds. First, as the court of appeals noted (Pet. App. 4a, 11a), those Southern Employees whose pension rights vested before the withdrawal will receive pensions from the Greater Funds. Also, the Greater Funds may be obligated to pay benefits to Southern Employees whose benefits had not vested at the time of withdrawal if those employees subsequently go to work for an employer that contributes to the Greater Funds. See 29 U.S.C. 1053(b)(3), 1054(e).

dures set forth in Section 1411(b).[5] Subsection (b), in turn, requires notice to the Pension Benefit Guaranty Corporation (PBGC) at least 120 days before the proposed transfer, Section 1411(b)(1), and imposes a number of substantive restrictions designed to prevent certain transfers that would harm participants, Section 1411(b)(2)-(4).[6] In our view, the court of appeals should not have ordered petitioners to transfer assets between pension plans without considering whether the transfer satisfied the requirements of Section 1411(b).[7]

Second, Section 1415 requires plan sponsors to transfer assets in one circumstance only: when an employer has withdrawn from a plan as a result of a change of collective bargaining representative and the covered employees will be covered by a new multiemployer plan. Because Local 144 continued to represent the affected employees after the Southern Employers' withdrawal, Section 1415 did not require a transfer.

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[5] "[A] plan sponsor may not cause a multiemployer plan to * * * engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such * * * transfer satisfies the requirements of subsection (b) of this section."

[6] Section 1411(b)(2) provides that no participant's accrued benefit may be lower immediately after the transfer than it was immediately before the transfer. Section 1411 (b)(3) provides that a transfer may not occur unless benefits are not expected to be suspended. Section 1411(b)(4) requires a recent actuarial valuation of the affected plans.

[7] To be sure, petitioners did not argue to the court of appeals that the transfer violated Section 1411. Nevertheless, at a minimum the court of appeals should have required the statutory notice to PBGC to be given before consummation of any transfer.

Finally, Section 1414(a) addresses asset transfers indirectly, by providing that any rules a plan adopts to govern transfers must "not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities." That provision imposes no obligation to transfer either assets or liabilities; it merely mandates that if a plan decides to transfer liabilities, any related transfer of assets must comply with uniformly-applied plan rules that do not unreasonably restrict the transfer of assets in connection with the transfer of liabilities. Accordingly, because no liabilities were transferred from the Greater Funds pension plan to the Southern Funds pension plan, Section 1414(a) has no application to this case. See *Vornado, Inc.* v. *Trustees of Retail Store Employees' Union Local 1262*, 829 F.2d 416, 419-421 (3d Cir. 1987).[8]

b. A fundamental precept of ERISA is this: Plan trustees must comply with "strict fiduciary standards" in the discharge of their duties. See *NLRB* v.

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[8] In explaining how reallocation should be fashioned on remand, the court of appeals stated that reserves should be transferred from the Greater Funds in proportion to the "liabilities now undertaken by the Southern Funds." Pet. App. 11a. The court of appeals apparently was referring to the fact that the Greater Funds owe no payments to employees who failed to vest, while the Southern Funds will make payments to those employees based on all of their years of service if they ultimately vest. But as the district court explained, "an assumption of liability for * * * past service credit is not the same as a transfer of liabilities from the Greater Funds to [the Southern Funds], since the latter implies that the Greater Funds has a preexisting obligation to those who left the plan, which simply is not the case here." *Id.* at 24a. Moreover, as discussed *supra*, at 3-4, the Greater Funds in fact retained all vested liabilities that had accrued at the time of withdrawal.

Amax Coal Co., 453 U.S. 322, 332 (1981). To this end, Section 404(a)(1)(B) of ERISA requires a fiduciary to

> discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries [and] with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

29 U.S.C. 1104(a)(1)(B). Similarly, trustees are prohibited from "act[ing] in any transaction involving the plan on behalf of a party * * * whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." ERISA Section 406(b)(2), 29 U.S.C. 1106(b)(2).[9]

ERISA's strict prohibitions protect plans against the risk that plan trustees will succumb to the temp-

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[9] Although this Court has recognized that Section 302(c)(5) of the LMRA implicitly imposes similar fiduciary duties on plan administrators by requiring them to hold plan assets "in trust," see *Amax Coal Co.*, 453 U.S. at 330, it is not clear whether the fiduciary duties created by the LMRA are enforceable in federal courts. See *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 573 n.12 (1982) ("The [*Amax Coal Co.*] Court did not decide, nor do we decide today, whether federal courts * * * are authorized to enforce those duties."). The question has limited practical importance in light of the ability of federal courts to enforce the similar duties imposed by ERISA. See 29 U.S.C. 1109(a) ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable."); 29 U.S.C. 1132(a)(2) ("A civil action may be brought by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title.").

tation to put their own interests ahead of those of the plan itself. See *Vornado*, 829 F.2d at 421 ("The trustees must reach all decisions guided by their fiduciary responsibilities; they must consider the welfare of the fund and the beneficiaries and are not free to reject all proposed transfers."). To be sure, legitimate considerations may suggest to the trustees that the best interests of the participants would be served by refusing to transfer assets. Thus, the new plan's failure to request a transfer of liabilities of the old plan (as appears to be the case here) tends to support a fiduciary decision not to transfer plan assets. In any case, prudence requires that trustees consider the short and long-term effects on the plan, whose benefit commitments, funding obligations, and currently available assets would be affected by the proposed transfer of funds. Finally, trustees should consider whether the proposed transfer complies with the asset transfer rules established by Title IV of ERISA, 29 U.S.C. 1411-1415. In sum, trustees must consider requests from departing employers in accordance with the general fiduciary duty ERISA imposes on them; the appropriate response will depend upon the specific circumstances of the existing plan and the requested transfer.[10]

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[10] The petition does not present a fiduciary-duty issue, because the court of appeals ruled in favor of respondents on the LMRA issue and thus had no occasion to consider respondents' claim that petitioners' refusal to transfer assets breached the fiduciary duties imposed by ERISA. See Pet. App. 12a. Two courts of appeals considering related fact patterns arising when single-employer plans split have concluded that trustees did not violate ERISA when they declined to transfer a portion of their plans' surplus to "spunoff" plans. See *Bigger* v. *American Commercial Lines, Inc.*, 862 F.2d 1341, 1347 (8th Cir. 1988); *Foster Medical*

3. The court of appeals' holding directly conflicts with the Seventh Circuit's holding in *Stinson* v. *Ironworkers District Council Benefit Trust*, 869 F.2d 1014 (1989). In that case, a local union and the employers with whom it had collective bargaining agreements withdrew from a multiemployer welfare fund to begin a new welfare fund. The union brought suit alleging that the trustees of the original fund violated Section 302(c)(5) when they promulgated an amendment prohibiting local unions withdrawing from the plan from obtaining an allocation of trust reserves proportional to their employers' contributions. Like respondents here, the union in *Stinson* argued that the original plan had violated the "sole and exclusive benefit" requirement of Section 302(c)(5). Specifically, the union contended that because "its active employees are no longer covered by the Trust, the money [previously] contributed for those employees * * * is being used not for their benefit, but for the benefit of other employees." 869 F.2d at 1020. The Seventh Circuit squarely rejected that argument:

> [B]ecause § 302(c)(5) does not place restrictions on the allocation of the funds among persons protected by § 302(c)(5), eligibility rules

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Corporation Employees' Pension Plan v. *Healthco, Inc.*, 753 F.2d 194, 199 (1st Cir. 1985). Those cases differ from the present case, however, because the trustees had transferred some liabilities, and had transferred sufficient assets to fund the transferred liabilities. See 29 U.S.C. 1058. The courts concluded that the employees participating in the spunoff plans had no claim for breach of fiduciary duty because they were protected adequately by compliance with Section 1058. See *Bigger*, 862 F.2d at 1347; *Healthco*, 753 F.2d at 199. In any event, this holding has no application to the case at bar, because Section 1058 does not apply to multiemployer plans.

> are valid under § 302(c)(5) so long as they result in a distribution of benefits only to employees on whose behalf contributions to the fund have been made. * * * Thus * * * the contributions from Local 22's employers are being used only for employees on whose behalf contributions to the fund were made—albeit not current employees of Local 22's employers. This does not violate the "sole and exclusive benefit" requirement.

Id. at 1022 (citations and internal quotation marks omitted).[11] The Seventh Circuit's analysis is directly contrary to the analysis of the court of appeals in this case.[12]

The need for uniformity of law on this issue is enhanced by its great practical significance. By granting employers a ready means to fund new plans, the court of appeals has made withdrawal from multiemployer plans more attractive. In light of the frequency with which employer withdrawals lead to

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[11] The *Stinson* court noted that certain individuals who already were receiving benefits would continue to receive benefits from the original plan. See 869 F.2d at 1022. The court stated, however, that its reasoning upholding the trustee's decision not to transfer assets would apply "even if no Local 22 employees remained in the fund." *Ibid.* In any event, the fact that some employees of the departing employer would continue to receive benefits does not distinguish *Stinson* from this case. See Pet. App. 11a (noting that "the already-vested pensioners" would continue to receive benefits from the Greater Funds).

[12] The petition presents an even more compelling case for not requiring a transfer under the LMRA, because this case involves a pension plan, for which asset transfers are covered by Title IV of ERISA; *Stinson* involved a welfare plan not covered by Title IV, and the Seventh Circuit nevertheless held that a transfer was not required.

litigation, the issue is likely to recur frequently.[13] Accordingly, in light of the square conflict in the courts of appeals and the manifest importance of the question presented, we believe plenary review is both appropriate and needed at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

MARSHALL J. BREGER
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

MARK S. FLYNN
Attorney
Department of Labor

CAROL CONNOR FLOWE
General Counsel

JEFFREY G. COHEN
Deputy General Counsel

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Assistant General Counsel

MARC A. TENENBAUM
Attorney
Pension Benefit Guaranty Corporation

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[13] For another recent decision regarding an attempt to compel a transfer of assets between multiemployer plans, see *Sheet Metal Workers' Local 28* v. *Gallagher*, No. 91-5056 (3d Cir. Apr. 3, 1992).

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